

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6074

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-6074

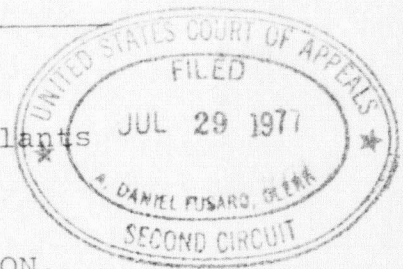
WESTPORT TAXI SERVICE, INC., et al.,

Plaintiffs-Appellants

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION,
et al.,

Defendants-Appellees



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE FEDERAL DEFENDANT-APPELLEE

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STATUTES INVOLVED

Urban Mass Transportation Act of 1964, as amended

SECTION 3 (49 U.S.C. §1602)

(a) (1) The Secretary is authorized, in accordance with the provisions of this Act and on such terms and conditions as he may prescribe to make grants or loans (directly, through the purchase of securities or equipment trust certificates, or otherwise) to assist States and local public bodies and agencies thereof in financing (1) the acquisition, construction, reconstruction, and improvement of facilities and equipment for use, by operation or lease or otherwise, in mass transportation service in urban areas and in coordinating such service with highway and other transportation in such areas, and (2) the establishment and organization of public or quasi-public transit corridor development corporations or entities. Eligible facilities and equipment may include personal property including buses and other rolling stock and real property including land (but not public highways), within the entire zone affected by the construction and operation of transit improvements, including station sites, needed for any efficient and coordinated mass transportation system which is compatible with socially, economically, and environmentally sound patterns of land use. No grant or loan shall be provided under this section unless the Secretary determines that the applicant has or will have

(A) the legal, financial, and technical capacity to carry out the proposed project; and

(B) satisfactory continuing control, through operation or lease or otherwise, over the use of the facilities and the equipment.

The Secretary may make loans for real property acquisition pursuant to subsection (b) upon a determination, which shall be in lieu of the preceding determination, that the real property is reasonably expected to be required in connection with a mass transportation system and that it will be used for that purpose within a reasonable period. No grant or loan funds shall be used for payment of ordinary governmental or nonproject operating expenses, nor shall any grant or loan funds be used to support procurements utilizing exclusionary or discriminatory specifications.

(2) It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States in the development of long-range plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. The development of projects in urbanized areas under this section shall be based upon a continuing, cooperative, and comprehensive planning process covering all modes of surface transportation and carried on by the States and the governing bodies of local

communities in accordance with this paragraph. The Secretary shall not approve any project in an urbanized area after July 1, 1976, under this section unless he finds that such projects is based on continuing comprehensive transportation planning process carried on in conformance with the objectives of this paragraph.

* * *

(d) Any application for a grant or loan under this Act to finance the acquisition, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant--

(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing;

(2) has considered the economic and social effects of the project and its impact on the environment; and

(3) has found that the project is consistent with official plans for the comprehensive development of the urban areas.

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

* * *

(e) No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after the date of the enactment of this Act) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act.

* * *

SECTION 4 (49 U.S.C. §1603)

(a) No Federal financial assistance shall be provided pursuant to subsection (a) of section 3 unless the Secretary determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and are necessary for the sound, economic, and desirable development of such area. Such program shall encourage to the maximum extent feasible the participation of private enterprise.....

SECTION 6 (49 U.S.C. §1605)

The Secretary is authorized to undertake research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing, and demonstration of new facilities, equipment, techniques, and methods) which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at maximum cost. He may undertake such projects independently or by grant or contract (including working agreements with other Federal departments and agencies). In carrying out the provisions of this section, the Secretary is authorized to request and receive such information or data as he deems appropriate from public or private sources.

I. STATEMENT OF ISSUES

1. Was the District Court correct to rule that the requirements of sections 3(d) and 3(e) of the Urban Mass Transportation Act (49 U.S.C. §§1602(d), 1602(e)) did not apply to the challenged demonstration project funded under section 6 of the Act (49 U.S.C. §1605)?
2. Was the District Court correct to find that there was no violation of any federal statutory or constitutional rights of the plaintiffs by reason of the challenged grant of assistance?

II. STATEMENT OF THE CASE.

On December 6, 1976, plaintiffs, the Westport Taxi Service, Inc. ("Westport Taxi"), a private taxi company licensed by the Connecticut Public Utilities Commission and incorporated under the laws of the State of Connecticut, and Michael and Anthony Gilbertie, residents of the State of Connecticut and owners-operators of Westport Taxi, brought this civil action for declaratory and injunctive relief in the United States District Court for the District of Connecticut, (Newman, District Judge). They sued the Secretary of the United States Department of Transportation, William T. Coleman, Jr. 1/ (hereinafter referred to as "federal defendant"), and Westport Transit District ("Westport Transit"). 2/

1/ Secretary Coleman has since been succeeded in office by Secretary Brock Adams. See Rule 25(d), Federal Rules of Civil Procedure.

2/ The directors of Westport Transit were subsequently joined as parties defendant.

The complaint alleged violations of five separate provisions of the Urban Mass Transportation Act of 1964, as amended, 3/ ("the UMT Act"); specifically: sections 3(d), 3(e), 4(a), 5(i) and 14(c). 4/ Additionally, plaintiffs asserted that defendants had failed to compensate Westport Taxi for alleged losses anticipated to occur from the operation of the challenged project, allegedly in violation of the UMT Act and the Fifth and Fourteenth Amendments to the United States Constitution.

The statutory and constitutional violations were alleged to occur by reason of federal defendant's approval of a grant of assistance to Westport Transit pursuant to section 6 of the UMT Act, 5/ purportedly without the procedures specified in the relevant statutes. The particular project at issue was approved by federal defendant on July 16, 1976, 6/ but the grant contract was not executed by the parties until December 16, 1976. 7/

3/ 49 U.S.C. §1601, et seq.

4/ 49 U.S.C. §§1602(d), 1602(e), 1603(a), 1604(l), 1610(c).

5/ 49 U.S.C. §1605.

6/ Memorandum of Approval of June 29, 1976.
Appellees' Appendix [B-201].

7/ Amendatory Agreement, Project No. CT-06-0007, p.6.
Appellees' Appendix [B-212].

The District Court denied plaintiffs' motion for a temporary restraining order on December 9, 1976, and scheduled a hearing on plaintiffs' request for injunctive relief for January 11, 1977. Defendants moved to dismiss, or in the alternative for summary judgment. An evidentiary hearing was held on January 11-12, 1977, at which the testimony of Michael Gilbertie, vice president of Westport Taxi and Richard Bradley, executive Director of Westport Transit, as well as documentary evidence 8/ was presented. At the close of the hearing, District Judge Newman agreed with the parties that the hearing would be considered the hearing on the merits. On April 5, 1977 the Court denied plaintiffs' reapplication for temporary injunctive relief.

On April 13, 1977, the District Court denied all of plaintiffs' requests for relief, and entered judgment in favor of defendants. Judgment was rendered on April 18, 1977, from which plaintiffs now appeal.

III. STATEMENT OF THE FACTS.

The program of federal assistance to urban mass transportation systems, authorized by the UMT Act, is administered by the Department of Transportation pursuant to Reorganization Plan No. 2 of 1968. 9/ All of the powers of the Secretary of Transportation under the UMT Act and related statutes have been delegated to the Administrator of the Urban Mass Transportation Administration, ("UMTA"). 10/

8/ References to the testimony of the witnesses will refer to the page numbers of the hearing transcript.

9/ 33 Fed. Reg. 6965 (June 30, 1968); 82 Stat. 1369.

10/ 49 CFR §1.51.

Section 6 of the UMT Act authorizes the Secretary of Transportation to undertake the following:

"...research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing, and demonstration of new facilities, equipment, techniques and methods) which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at minimum cost. He may undertake such projects independently or by grant or contract (including working agreements with other Federal departments and agencies). In carrying out the provisions of this section, the Secretary is authorized to request and receive such information or data as he deems appropriate from public or private sources." 11/

On April 11, 1975, Westport Transit submitted an application to UMTA for a grant of \$25,000 for a research, development and demonstration project under section 6 of the UMT Act to study the feasibility of the development of an integrated system of conventional and paratransit services in the communities of Westport and Weston, Connecticut. 12/ On June 26, 1975 the UMTA administrator approved this project, designated Project No. CT-06-0007. 13/

11/ 49 U.S.C. §1605.

12/ See Application. Appellees' Appendix [B-5, et seq.].

13/ Memorandum of Approval of June 23, 1975.
Appellees' Appendix [B-52].

The study funded by the \$25,000 grant was prepared by ECI Systems, Inc. for Westport Transit, and was submitted to UMTA on December 19, 1975. 14/ Thereafter, on January 31, 1976, Westport Transit applied for a grant of \$610,441 under section 6 of the UMT Act to implement the previously funded study. 15/ The object of the project, as described in the Application, was to develop a comprehensive transportation system through a total integration of conventional and paratransit services operated by the public agency and private mass transportation operators under contract to the public agency, to serve as a model for potential future use nation-wide in similar urbanized areas. 16/

On July 16, 1976 the UMTA Administrator approved an amendatory grant of \$610,000 for the two-year demonstration project. 17/ A grant contract between UMTA and Westport Transit was executed on December 16, 1976, committing UMTA to fund and Westport Transit to undertake the project described in the Application and Memorandum of Approval. 18/

Prior to the approval of the grant, Westport Transit held a public hearing on the project following notice in the Westport News, a newspaper of general circulation in the Westport community. 19/ While plaintiffs had actual notice of the hearing,

- 14/ See "Summary of Plan For A Service And Methods Demonstration." Appellees' Appendix [B-57, et seq.].
15/ See Application. Appellees' Appendix [B-72, et seq.].
16/ Id. [B-83].
17/ Memorandum of Approval of June 29, 1976. Appellees' Appendix [B-201].
18/ Amendatory Agreement, Project No. CT-06-0007. Appellees' Appendix [B-211].
19/ See Articles from Westport News. Appellees' Appendix [B-220, et seq.].

neither they nor anyone representing their interests appeared to oppose the project. 20/ Moreover, both prior to and after the project's approval, Westport Transit made every effort to invite and encourage the plaintiffs to bid on participation in the project, and negotiated at length on possible roles for plaintiffs to play as part of the demonstration project. Plaintiffs refused all reasonable offers to participate. 21/

On April 16, 1977, following Judge Newman's decision to deny plaintiffs the relief which they sought, the new services funded by the project were inaugurated by Westport Transit, without plaintiffs' participation.

IV. ARGUMENT.

1. Summary.

Plaintiffs argue that the District Court was in error to interpret sections 3(d) and 3(e) of the UMT Act as inapplicable to the demonstration project at issue. They incorrectly assert that both subsections apply to every project funded with financial assistance under the UMT Act, and that defendants' alleged failure to comply with those subsections in this case is reason to enjoin the project at issue.

Federal defendant submits that Judge Newman was correct in ruling that the requirements of sections 3(d) and 3(e) were inapplicable to Westport Transit's application for assistance under section 6 of the UMT Act, and that the policy considerations

20/ See: "Summary of Public Hearing." Appellees' Appendix [B-223]; Ruling, Slip Opinion at 12.

21/ See Ruling, Slip Opinion at 12.

underlying both subsections were nevertheless taken into account by defendants. Most importantly, federal defendant contends that plaintiffs were afforded ample opportunity to participate in the challenged project. Plaintiffs cannot credibly maintain that their participation was not encouraged "to the maximum extent feasible" for the sole reason that they chose not to participate.

In addition, federal defendant respectfully submits that the District Court incorrectly held that these plaintiffs had standing to challenge the project on the grounds that section 3(e) of the UMT Act was violated. Therefore, the District Court's ruling could be affirmed for the additional reason that plaintiffs were without standing to complain under section 3(e) of the UMT Act.

2. The District Court Was Correct To Rule That The Requirements Of Sections 3(d) And 3(e) Of The UMT Act Did Not Apply To The Demonstration Project At Issue.

A. Plaintiffs' Literal Reading Of The UMT Act Would Result In The Stultification Of The Purposes Of The Act.

Plaintiffs argue that both subsections 3(d) and 3(e) of the UMT Act, by their very terms, apply to every application for assistance under the UMT Act, without qualification. This is they argue, because the statutory language, taken literally and selectively, refers to "[A]ny application for a grant or

loan under this Act..."; 23/ and to "...financial assistance...
under this Act...." 24/ Plaintiffs thus focus on selective
words divorced from their proper context, and they urge this
Court to interpret those terms literally. Judge Newman refused
to do this; and so should this Court.

This Court has recognized that statutory language need not
always be taken literally. In Cabell v. Markham, 25/ Circuit
Judge Learned Hand stated the following for the Court:

"The defendants...say that we are not free to
depart from the literal meaning of the words,
however transparent may be the resulting stultification
of the ~~scheme~~ or plan as a whole.

Courts have not stood helpless in such situations;
the decisions are legion in which they have
refused to be bound by the letter, when it
frustrates the patent purpose of the whole statute... .
Of course it is true that the words used, even
in their literal sense, are the primary, and
ordinarily the most reliable, source of interpreting
the meaning of any writing: be it a statute,
a contract, or anything else. But it is one of the
surest indexes of a mature and developed juris-
prudence not to make a fortress out of the dictionary;
but to remember that statutes always have some
purpose or object to accomplish, whose sympathetic
and imaginative discovery is the surest guide to
their meaning." 26/

Plaintiffs' literal approach to the meaning of the
relevant subsections of the UMT Act would leave this Court
nothing but the bare words of the statute. The Supreme Court,
in Lynch v. Overholser, 27/ stated the following concerning this
sort of approach:

23/ 49 U.S.C. §1602(d). Emphasis added.

24/ 49 U.S.C. §1602(e). Emphasis added.

25/ 148 F. 2d 737 (2d Cir., 1945); aff'd, 326 U.S. 404 (1945).

26/ Id., at p. 739. Citations omitted.

27/ 369 U.S. 705 (1961).

"The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute. e.g., Church of the Holy Trinity v. United States, 143 U.S. 457, 459-462; Markham v. Cabell, 326 U.S. 404, 409; for 'literalness may strangle meaning' Utah Junk Co. v. Porter, 328 U.S. 39, 44." 28/

Recent decisions of this Court have continued to recognize the need to go beyond the mere words of a statute. In Haberman v. Finch, 29/ this Court stated:

"It is a familiar maxim of statutory interpretation that courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation."

In GAF Corp. v. Milstein, 30/ this Court stated:

"We are well aware of the first catechism of statutory construction which teaches that we should begin the process of interpretation with 'the language of the statute itself'....; that, however, is toto caelo from saying that the process must end there or that we are required to blind ourselves to other relevant aids to construction, particularly when dealing with a statute as complex as the one before us." (Citations omitted).

Federal defendant contends that a literal and selective reading of these two subsections is unwarranted, and would result in the frustration of the overriding purposes of the UMT Act taken as a whole. We submit that plaintiffs are incorrect to assert that subsections 3(d) and 3(e) "plainly" apply to the grant of assistance at issue, and that plaintiffs' argument is based on an incorrect and selective interpretation of the relevant subsections. 31/ Judge Newman was correct to hold that these

28/ Id., at p. 711.

29/ 418 F. 2d 664, 666 (2d Cir., 1969).

30/ 453 F. 2d 709, 716 (2d Cir., 1971).

31/ Appellants' Brief at pp. 17, 29.

subsections are inapplicable to the project at issue. To hold otherwise would unjustifiably interfere with the intent of Congress as expressed in the UMT Act as a whole, and with the various programs undertaken by federal defendant to carry out that intent.

B. The UMT Act, Taken As A Whole, Provides For Different Forms Of Assistance For Different Purposes.

In 1964, Congress responded to a growing pattern of decline in the Nation's mass transportation systems by enacting the Urban Mass Transportation Act of 1964. 32/ The congressionally mandated purposes of the UMT Act are to assist in the development of improved mass transportation facilities, to encourage the planning of urban mass transportation systems with the cooperation of mass transportation companies, both public and private, and to provide assistance to State and local governments and their instrumentalities in financing such systems, "to be operated by public or private mass transportation companies as determined by local needs." 33/

To carry out these purposes, the Administrator of UMTA makes grants or loans to State and local public bodies for projects in all aspects of mass transportation. The heart of the program of mass transportation assistance involves grants of capital assistance under section 3, 34/ and grants of capital and operating assistance under section 5 of the UMT Act. 35/ Supporting the programs undertaken pursuant to these sections, UMTA provides assistance under another five sections for varying purposes. Section 9 36/ authorizes grants for a variety of technical studies. Section 10 37/ authorizes grants for the

32/ Pub. Law 88-365; July 9, 1964; 78 Stat. 302.

33/ 49 U.S.C. §1601(b). Emphasis added. See South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F. 2d 535 (7th Cir.; 1969).

34/ 49 U.S.C. §1602.

35/ 49 U.S.C. §1604.

36/ 49 U.S.C. §1607a.

37/ 49 U.S.C. §1607b.

provision of fellowships for managerial training programs in nonprofit institutions of higher education. Section 11 38/ authorizes grants to universities for research and training in urban transportation problems. Section 16(b) 39/ authorizes assistance to provide for the special needs of the elderly and handicapped. Section 6 40/, about which we are here concerned, authorizes assistance for research, development and demonstration projects.

The various programs of assistance carry with them certain requirements which must be met before assistance may be granted. Some requirements are unique to grants under a single section of the UMT Act; other requirements may or may not apply to a grant of assistance depending upon the characteristics of the project involved. By far, the most far-reaching set of pre-approval requirements apply to assistance under sections 3 and 5 of the UMT Act. This is sensible in that projects undertaken pursuant to these sections generally involve major construction or acquisition of facilities and vehicles and the expenditure of large amounts of federal funds to help operate local mass transportation systems.

The project challenged by plaintiffs is not one undertaken pursuant to section 3 or section 5 of the UMT Act. Very clearly, Project No. CT-06-0007-01 is a demonstration project funded under section 6 of the UMT Act, for a limited time and for a very specific purpose. The District Court recognized this.

38/ 49 U.S.C. §1607c.
39/ 49 U.S.C. §1612(b).
40/ 49 U.S.C. §1605.

The project is designed to demonstrate a new concept in mass transportation. That is, defendants seek to establish and examine a system integrating traditional services (e.g., fixed-route bus) with paratransit services (e.g., shared-ride taxi), to be operated by private transportation companies under contract to the public transit authority. The overriding purpose of this demonstration, as in all such projects, is to provide a model for potential use nationwide in similar urbanized areas. Moreover, the grant of assistance is limited to a two-year duration.

If Westport Transit should wish to continue operation of the services established by the demonstration project, assistance to operate such services will not be granted under section 6. Rather, Westport Transit will be required to apply for assistance under either section 3 or section 5 of the UMT Act, and will be required to comply with all requirements of those sections.

The instant case, however, concerns the requirements for section 6 assistance. In their complaint, plaintiffs challenged the grant of assistance as violative of a whole range of requirements. They alleged that the hearing certification and environmental requirements of sections 3(d), 5(i) and 14(c) of the UMT Act were not met. They claimed that section 4(a) was not satisfied. Finally, they relied on section 3(e). 41/ Defendants argued, and Judge Newman found, that none of those sections of the UMT Act apply to the specific demonstration

41/ See footnote 4, supra.

project challenged by plaintiffs. Plaintiffs now limit their challenged on appeal to subsections 3(d) and 3(e). Just as the first three sections were found not to apply, these two subsections are inapplicable.

C. The Hearing Certification Requirement Of Section 3(d) Of The UMT Act Is Inapplicable To This Demonstration Project Funded Pursuant To Section 6 Of The UMT Act.

Section 3(d) provides that "[A]ny application for a grant or loan under this Act to finance the acquisition, construction, or improvement of facilities or equipment, which will substantially affect a community or its mass transportation service shall include a certification that the applicant ____" has held a public hearing after adequate prior notice. 42/

Plaintiffs would have this Court read the first ten words of this subsection, "Any application for a grant or loan under this Act...", and nothing more. Such a reading would overwhelmingly place form over substance and would ignore the true intent of Congress. This subsection does not apply to all applications, but, rather, to applications for assistance whose purpose is "to finance the acquisition, construction, reconstruction or improvement of facilities or equipment, which will substantially affect a community... ." Federal defendant submits that Congress meant this requirement to apply to major capital projects funded under section 3 of the UMT Act and not to demonstration projects, such as that challenged by plaintiffs, funded under section 6.

42/ 49 U.S.C. §1602(d).

Section 3(a)(1) authorizes assistance to finance the "acquisition, construction, reconstruction, and improvement of facilities and equipment....", the very language used in section 3(d). Moreover, the report of the House Banking and Currency Committee, to which the Urban Mass Transportation Assistance Act of 1970, 43/ of which section 3(d) was part, was referred, states the following with respect to this subsection:

"(d) Public hearings--A State or local public body which files an application for a loan or grant under section 3 of the act, for the acquisition or improvement of capital facilities and equipment which will substantially affect a community or its mass transit service, is required to include in its application a certification... ." 44/

Requiring applicants for section 3 assistance to comply with this certification procedure before implementing a project is a sensible restriction. Such assistance is used for major projects often having long-lasting or permanent effects. Thus, affording the public an opportunity to comment on the project, and requiring local authorities to consider the project's economic, social and environmental effects are necessary to carry out the long-term goals of such projects.

Likewise, the hearing certification requirement of section 5(i), 45/ which applies only to capital or operating assistance

43/ Pub. Law 91-453; October 15, 1970; 84 Stat. 962.

44/ H.R. Report (Banking and Currency Committee) No. 91-1264, June 30, 1970; 1970 U.S. Code Congressional and Administrative News, p. 4101 (91st Cong., 2d Sess.). Emphasis added.

45/ 49 U.S.C. §1604(i).

grants funded under section 5, assures that adequate consideration is given to major projects undertaken pursuant to that section. Interestingly, when Congress added section 5 to the UMT Act in 1974, 46/ subsection 5(i) was specifically included, despite the identical provision of subsection 3(d). This indicates that it was not the understanding of Congress that subsection 3(d) applies to "any application...under this Act," as plaintiffs contend. Rather, Congress intended section 3(d) to apply to section 3 projects, and section 5(i) to apply to section 5 projects. If plaintiffs' interpretation is correct, then section 5(i) is redundant.

Section 6 demonstration projects, unlike section 3 or section 5 projects, are of limited duration, 47/ and are specifically for the purpose of providing information which, after analysis, can be used in capital or other projects in other urbanized areas, 48/ Senator Harrison Williams, the sponsor of the Urban Mass Transportation Act of 1964, stated the following with respect to section 6 assistance:

46/ National Mass Transportation Assistance Act of 1974; Pub. Law 93-503; November 26, 1974; 88 Stat. 1565.

47/ The challenged project is limited to a duration of two years. See: Application. Appellees' Appendix [B-78]; Memorandum of Approval of June 29, 1976. Appellees' Appendix [B-200].

48/ See Application. Appellees' Appendix [B-108].

"...[T]o be eligible for a demonstration grant, a project must be able to produce results useable in other areas." 49/

Thus, any "acquisition, construction, reconstruction, or improvement of facilities or equipment" involved in such projects would be merely incidental to the central purpose of the grant. Moreover, if and when the information gained through a demonstration project is later used in implementing a capital project financed under section 3 or 5 of the UMT Act, the requirements of those sections, including section 3(d), would apply to that project. 50/

This is not to say that UMTA and Westport Transit were insensitive to the policies underlying section 3(d). It is undisputed that a public hearing was held on the challenged project. 51/ The record shows that after notice in the Westport News, Westport Transit held a public hearing on January 15, 1976. While plaintiffs had actual knowledge of the hearing, they did not attend to air their objections to the project. Rather, they waited until months later to challenge the project in District Court, on the eve of the project's implementation. In addition, the potential environmental effects

49/ 109 Cong. Rec. 216 (1963).

50/ Plaintiffs' concern over the anticipated continuation of this project following completion of the two-year demonstration, (Appellants' Brief at p. 10), should be lessened by the fact that section 3(d) will apply to any capital assistance sought by Westport Transit to continue the operation of the newly developed services. Similar requirements in section 5(i) will apply to any operating assistance sought by Westport Transit.

51/ See: Appellants' Brief, at p. 9; Appellees' Appendix. [B-223, et seq.].

of the project were taken into consideration. The approval memorandum indicates that the project was reviewed under the National Environmental Policy Act of 1969, 52/ which applies to all federal actions, and was found not to require an environmental impact statement. Thus, while we contend that Judge Newman was correct to hold section 3(d) inapplicable to the challenged project, we note that defendants' concern for that subsection's underlying policies was considerable.

That demonstration projects do not need to comply with all of the requirements of section 3 projects was recognized by the United States District Court for the Eastern District of Pennsylvania in Township of Ridley v. Blanchette. 53/ There, the Court examined an UMTA demonstration project funded under section 6 and found that the project did not require the certification of public hearing under section 3(d). 54/ While the Court did note that the project there at issue was undertaken pursuant to contract under section 6, 55/ it is undeniably clear that the holding distinguishes between standard section 3 capital

52/ 42 U.S.C. §4321, et seq.

53/ Civil Action No. 74-2113 (E.D. Pa., October 12, 1976). Copy of unreported decision is included in Appellees' Appendix. [B-238, et seq.].

54/ Similarly, the Court found the requirements of section 14(c), (49 U.S.C. §1610(c)), to be inapplicable to a section 6 demonstration project. Slip opinion [B-248].

55/ See Appellants' Brief at p. 30, n. 13.

projects and projects undertaken pursuant to section 6 "with broader experimental-developmental-demonstrational purposes." 56/ The latter type of project, the Court held, "is not subject to the notice and hearing requirements of section 1602(d)." 57/

Thus, there is ample basis for Judge Newman's ruling that the challenged project, being one authorized by section 6 rather than section 3, did not need to comply with the strict requirements of section 3(d).

D. The Requirements Of Section 3(e) Of The UMT Act
Are Inapplicable To This Demonstration Project
Funded Pursuant To Section 6 Of The UMT Act.

As with subsection 3(d), plaintiffs assert a literal interpretation of subsection 3(e) that is divorced from its context. Section 3(e) is a complex requirement which seeks to assure that UMTA funds do not support public mass transportation programs which arbitrarily exclude existing private mass transportation companies. 58/ Financial assistance "... for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company ..." is conditioned upon the occurrence of four events:

"(1) the Secretary finds that such assistance is essential to a program ... for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area;

56/ Appellees' Appendix [B-247].

57/ Id. [B-248].

58/ See 110 Cong. Rec. 14970-71 (1964).

(2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies;

(3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws; and

(4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of the Act." 59/

We contend that Judge Newman correctly held that the requirements of section 3(e) relied upon by plaintiffs have no application to section 6 demonstration projects. This is clear from the language of the subsection, taken as a whole. It relates to assistance "for the purpose of" acquiring or competing with existing private mass transportation companies. The purpose of a demonstration project is to demonstrate new concepts in mass transportation. Any acquisition of or competition with private mass transportation companies would be merely incidental to this overriding purpose.

Secondly, the conditions contained in subsections 3(e)(1) and (2) relate to "a program ... for a unified or officially coordinated urban transportation system as part of the comprehensively planned developed of the urban area." This "program" is discussed in section 4(a) of the UMT Act, 60/ which refers

59/ 49 U.S.C. §1602(e), Emphasis added.

60/ 49 U.S.C. §1603(a).

specifically to section 3 assistance. Section 4(a) conditions section 3 assistance upon such assistance being needed for carrying out "a program for a unified of officially coordinated urban transportation system...." Section 3(e)(1) makes this requirement even more stringent where the purpose of the sections 3 funds is to acquire or compete with an existing private mass transportation company. Section 3(e)(2) states that this program must, to the maximum extent feasible, provide for the participation of private mass transportation companies. 61/ The requirement of including section 3 projects in a program is necessary for major, long-term capital projects to assure the rational and comprehensive planning of urban transportation systems. Such planning is inappropriate for short-term demonstration projects undertaken pursuant to section 6, and UMTA, the agency charged with implementing the UMT Act, has consistently interpreted it as such.

One example of how this interpretation has been expressed concerns the procedures by which federally assisted projects must be reviewed for consistency with regional goals, objectives and plans pursuant to Office of Management and Budget Circular No. A-95. UMTA has published in the Federal Register regulations governing this "A-95" review of urban mass transportation projects. 62/

61/ Plaintiffs appear to incorrectly interpret section 3(e)(2) as applying to all projects.

62/ 41 Fed. Reg. 10316 et seq. (March 10, 1976).

Section 6 demonstration projects, such as the one challenged herein, are specifically exempted, as follows:

"Experimental studies or operational tests of techniques or concepts that are as yet unproven and which require further study or demonstration to determine if they should be encouraged on a national scale, undertaken under a section 6 Demonstration Grant, are exempt from the requirements of this section." 63/

In addition, UMTA has published in the Federal Register regulations establishing guidelines for the development, content and processing of the comprehensively planned program called for in section 4(a) and referred to in section 3(e). 64/ These regulations are specifically limited in their applicability to projects undertaken pursuant to sections 3 and 5. 65/ There is no mention of projects funded under section 6.

This administrative construction of the requirements of the UMT Act is entitled to judicial deference. 66/ It is a rational construction, supportive of the different purposes to be served by assistance under different sections of the UMT Act. Section 6 projects are of short duration and require flexibility to demonstrate new concepts. Section 3 projects have long-lasting or permanent effects, and need to be incorporated into coordinated plans for the long-term development of an urbanized area. Thus,

63/ Id., at 10317. See 49 CFR §613.306(a)(2)(iii).

64/ 40 Fed. Reg. 42976 et seq. (September 17, 1975). A useful description of these regulations is found in County of Los Angeles, Cal. v. Coleman, 423 F. Supp. 496; 498 (D.D.C., 1976).

65/ Id. at 42982. See 23 CFR §450.302(a)(3).

66/ Udall v. Tallman, 380 U.S. 1, 16 (1964).

as Judge Newman recognized, the challenged project is not of the sort contemplated to trigger the requirements of section 3(e). 67/ If, however, Westport Transit applies for assistance to continue its operations following completion of the two-year demonstration, section 3(e) would be applicable.

Federal defendant further contends that the requirements of section 3(e), even assuming applicability to section 6 demonstration projects, do not apply in this case because there is no "private mass transportation company" with which the assistance will compete. That is, we contend that plaintiffs are not a private "mass transportation" company as defined in section 12(c)(5) of the UMT Act. 68/ That definition is as follows:

"... transportation by bus, or rail or other conveyance, either publicly or privately owned, which provides to the public either general or special service... on a regular and continuing basis."

UMTA, the agency charged with administering the UMT Act, has consistently interpreted this definition so as to exclude services which can be reserved for the exclusive use of an

67/ Judge Newman specifically found that "since no franchise or property interest has been acquired to trigger a duty to compensate, §1602(e)(3) has not been violated," (Ruling, slip opinion at p. 12). Plaintiffs admit that the certification required to satisfy section 3(e)(4) was made. See Appellants' Brief, at 16, n.6.

68/ 49 U.S.C. §1608(c)(5).

individual or a private group, such as exclusive-ride or "premium-ride" taxi service. 69/ Prior to 1968, the term "mass transportation" was statutorily defined as follows:

"...transportation by bus, or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing services) and moving over prescribed routes." 70/

This original definition clearly excluded taxi services which do not move "over prescribed routes." This was amended to read as it does today by section 702 of Public Law 90-448, the Housing and Urban Development Act of 1968. The Senate Report on section 702 states that the purpose of the amendment was to broaden the definition "to allow greater flexibility in developing and applying new concepts and systems in urban mass transportation programs," such as computer-aided small bus "dial-a-ride" systems. 71/ There is no indication in the legislative history of this 1968 amendment that Congress intended to broaden the definition of "mass transportation" to include exclusive-ride taxi service.

The emphasis of the new definition is on "general or special service... on a regular or continuing basis." UMTA includes within this definition any form of collective

69/ See Affidavit of Charles F. Bingman, para. 10., Appellees Appendix [B-3]; Affidavit of Robert H. McManus, para. 3. Id. [B-218]. UMTA's construction of the term "mass transportation" does not distinguish between services operated by private or public entities. Hence, a private taxi operator who provides shared-ride service would qualify as a "mass transportation" company.

70/ Pub. Law 88-365; July 9, 1964; 78 Stat. 302.

71/ Sen. Rep. No. 90-1123, 90th Cong., 2nd Sess., pp. 76-77 (1969). Identical language is found in H.R. Rep. No. 1585, 90th Cong., 2d Sess., pp. 65-66 (1968).

transportation service regularly available to the members of the public, such as shared-ride taxi. 72/ Plaintiffs claim that they operate "shared-ride" taxi service. 73/ Yet, this operation is limited by PUCA Regulation §16-319-15 as follows:

"(c)onsent of the patron first hiring the taxicab shall be obtained if additional patrons are to be carried."

Thus, merely by refusing to consent to additional passengers, any individual may reserve the plaintiffs' service for his or her exclusive use. It is common sense, and has consistently been UMTA's policy, that "shared-ride" services are only those in which the vehicle may not be reserved for the exclusive use of an individual. 74/ For, "shared-ride" service as contemplated by the PUCA Regulations would of necessity not be "general or special service... on a regular or continuing basis" as required by section 12(c)(5) of the UMT Act, as amended. Thus, Congress did not intend to bring traditional, exclusive-ride taxi service, such as that provided by plaintiffs pursuant to State regulation, into the expanded definition adopted in 1968.

Thus, in the recently published UMTA Proposed Policy Statement on Paratransit Services 75/ relied upon by plaintiffs, the following is stated:

72/ Affidavit of Charles F. Bingman, para. 10 Appellees' Appendix [B-3].

73/ See: Appellants' Brief at p. 8; testimony of Michael Gilbertie (54).

74/ Affidavit of Charles F. Bingman, para. 10. Appellees' Appendix [B-3]; Affidavit of Robert H. McManus, para. 3. Appellees' Appendix [B-218].

75/ 41 Fed. Reg. 46412 (October 20, 1976).

"Paratransit services which may qualify for Federal financial assistance include dial-a-ride, jitney, community minibus, subscription bus service, certain forms of vanpooling and other types of collective (shared-ride) transportation services which are regularly available to the public, i.e., which cannot be reserved for the private and exclusive use of individual passengers.

Services which are not eligible for Federal financial assistance include exclusive-ride taxi services, car rental services, for-hire limousines and private ambulance service, and other similar forms of private transportation." 76/

The services provided by plaintiffs are included in this latter category, making plaintiffs something other than a private "mass transportation" company within the protections afforded by section 3(e) of the UMT Act. As evidenced by the executed contract between Westport Transit and UMTA, 77/ the only type of taxi service to be funded by the challenged grant will be "shared-ride" service. Thus, the absence of plaintiffs in the project does not violate section 3(e)(2) for the reason that plaintiffs are not a "private mass transportation company" within the meaning of that subsection.

In any event, the record clearly shows that the policy consideration underlying section 3(e)(2) was more than adequately met. As previously noted, the very purpose of the demonstration project at issue was to demonstrate new ways to involve private taxi operators in a comprehensive mass transportation system. 78/ Negotiations with plaintiffs to participate in the project were

76/ Id., at 46413. Emphasis added.

77/ Appellees' Appendix [B-208]. The document submitted in Appellants' Appendix [A-145] is not a copy of the executed contract.

78/ The grant application includes the following: "The Demonstration will develop an exemplary model illustrating mechanisms and relationships which allow for the integration of services provided by multiple operators functioning in both the public and private sectors...." See Appellees' Appendix [B-84].

lengthy, but futile. 79/ Section 3(e) of the UMT Act does not, as plaintiffs appear to think, prohibit all federally assisted competition with existing private operators. 80/ It requires only that the UMTA Administrator be satisfied that private mass transportation operators participate "to the maximum extent feasible." We therefore submit that the District Court was correct to hold that "(T)he fact that the negotiations were unsuccessful does not mean that there has been a statutory violation. All the statute requires is encouragement of private participation 'to the maximum extent feasible'. It does not allow private transit operators to write their own ticket." 81/

E. The District Court's Ruling Should Be Affirmed For The Additional Reason That Plaintiffs Have No Standing To Challenge An UMTA Project On Grounds Of An Alleged Violation Of Section 3(e).

Although the District Court found that plaintiffs' status as a private provider of "one type of shared-ride service, albeit with the consent of the first rider" places them "arguably" within the zone of interests to be protected by section 3(e), we respectfully submit that this Court should hold that plaintiffs are without standing, and affirm the District

79/ See: Ruling, slip opinion at p. 12; testimony of Richard Bradley (71-72); testimony of Michael Gilbertie (56).

80/ See 110 Cong. Rec. 14970-71 (1964).

81/ Ruling, slip opinion at p. 12. Emphasis added.

Court for this additional reason. 82/

We contend that the zone of interests to be protected by section 3(e) of the UMT Act 83/ encompasses the competitive interest of all private mass transportation companies affected by the federally assisted activities of local public bodies under sections 3 and 5 of the UMT Act. This zone of interests is not unlimited, but is restricted to those entities which operate services included within the definition of the term "mass transportation", as construed by UMTA. 84/ Inasmuch as Congress and UMTA have not included exclusive-ride taxi services within this definition, this court should find that plaintiffs have no standing to challenge the instant project for alleged violations of section 3(e).

F. The District Court's Ruling That There Was No Violation Of Sections 3(d) And 3(e) Of The UMT Act Should Be Affirmed.

In the District Court, defendants argued, and Judge Newman held, that the provisions of subsections (d) and (e) of section 3 of the UMT Act are inapplicable to the demonstration project at issue. Alternatively, it was argued and found that the

82/ In other contexts it has been held that an appellate court may forego reaching the question of the propriety of the District Court's disposition of a case, but reach substantially the same result for other reasons. See: Urban Contractors Alliance of St. Louis v. Bi-State Development Agency, 531 F. 2d 877, 880 (8th Cir., 1976); Kuhn v. National Association of Letter Carriers, 528 F. 2d, 767 at 770, n.4. (8th Cir., 1976).

83/ See Association of Data Processing Services Organization, Inc. v. Camp, 397 U.S. 150, 152-153 (1970).

84/ See discussion, pp. 24-25, supra.

policy considerations underlying both subsections were fully recognized and taken into account. Plaintiffs simply argue that the provisions do apply, and that their requirements were not strictly met.

We submit that to agree with plaintiffs would be to misconstrue the UMT Act and to place form over substance. Such a course would disrupt the administrative implementation of the UMT Act, inexcusably delay the continued operation of a worthwhile demonstration project and afford plaintiffs little substantive relief. For, even if this Court finds that the District Court was in error in holding sections 3(d) and (e) inapplicable to this section 6 demonstration project, the ultimate relief could only be to remand the project approval to the UMTA Administrator in order to make the allegedly mandated certification and findings. ^{85/} Assuredly, plaintiffs would then find themselves in the same situation as they are in at present.

We submit, therefore, that the District Court was correct to deny plaintiffs' motions for injunctive relief and to enter judgment in favor of defendants.

3. The District Court Was Correct To Hold That There Was No Violation Of Any Federal Right To Compensation By Reason Of The Challenged Grant And That Such Claims Grounded In State Law Should Be Determined In State Tribunals

Plaintiffs assert that the challenged project will result in a "taking" of their property rights without compensation in violation of sections 3(e) and 4 of the UMT Act and the Fifth

^{85/} See Camp v. Pitts, 411 U.S. 138, 143 (1972).

and Fourteenth Amendments to the United States Constitution. Their claim in this regard is based on the notion that there is a federal right to be free from Government-assisted competition. We submit that the District Court was correct to hold that under the instant circumstances, there has been no compensable taking.

While there is no general right to be free from governmental competition, 86/ such a right may be created by statute. Here, however, the UMT Act, at best, arguably, gives the plaintiffs the "right" to be included in Westport Transit's program "to the maximum extent feasible." As the District Court recognized, this "right" was not violated. 87/ Moreover, section 3(e)(3) of the UMT Act requires compensation only where there has been an acquisition of a franchise or other property interest. As the District Court correctly found, there has been no such acquisition. 88/

Hence, the District Court was correct to find that defendants have not violated any federal right to compensation.

Similarly, the Court was correct to defer to the appropriate state tribunals to determine whether there is a state-created property right which has been "taken" by defendants' actions. While claims based upon state law may in some cases be heard in federal court, doing so is within the discretion of the federal

86/ See Tennessee Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939).

87/ Relevant language in section 4(a) is even more general than section 3(e) with respect to the "rights" of private transit operators. In any event, section 4(a), by its very terms, applies only to projects undertaken pursuant to section 3.

88/ Ruling, slip opinion at p. 12.

court. The Supreme Court, in United Mine Workers v. Gibbs, 89/ stated the rule as follows:

"That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them... ." 90/

In deciding the instant question, issues of state law would clearly predominate. "Needless decisions of state law should be avoided...." 91/

Hence, we submit that Judge Newman exercised his discretion correctly deferring to the appropriate state tribunals for resolution of this claim.

V. CONCLUSION

The crux of plaintiffs' claims is that defendants have inaugurated certain mass transportation services without plaintiffs' participation. Plaintiffs' absence from the project can be explained by their own refusal to participate. 92/ In an attempt to deny defendants the opportunity to carry out a worthwhile demonstration project that will improve transit service to the community of Westport and provide an information base which will enable other communities to do the same, plaintiffs focus

89/ 383 U.S. 715 (1965).

90/ Id. at 726. Citations omitted.

91/ Id.

92/ See testimony of Richard Bradley (71-72) and Michael Gilbertie (56).

on the bare words of two subsections of the UMT Act. In fact, plaintiffs fail to focus on those subsections read in their entirety. Moreover, they fail to consider the larger context of the UMT Act taken as a whole.

Federal defendant respectfully submits that the District Court correctly interpreted those subsections as being inapplicable to the challenged demonstration project. The District Court also correctly found that the policy considerations underlying both subsections were fully recognized. Judge Newman thus correctly denied plaintiffs' motions for injunctive relief and entered judgment for defendants.

That ruling was correct and should be affirmed.

Respectfully submitted,

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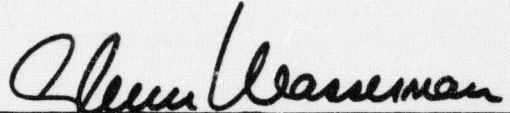
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTPORT TAXI SERVICE, INC., et al.,	)	
Appellants,	)	
	)	
vs.	)	Docket No. 77-6074
	)	
BROCK ADAMS, Secretary of	)	
Transportation, et al.,	)	
Appellees	)	
	)	

CERTIFICATE OF SERVICE

This is to certify that two copies of federal Defendant - Appellee's Brief and one copy of Defendants - Appellee's Appendix were mailed this 28th day of July, 1977, to counsel for all other parties to this Appeal, Richard A. Silver, Esq., 733 Summer Street, Stamford, Connecticut 06905 and J. Daniel Sagarin, Esq., 855 Main Street, Suite 825, Bridgeport, Connecticut 06604.


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